BUHARI SABIREN & ANOR *a*

v.

SEA KEE FENG

HIGH COURT MALAYA, MUAR *b*
JEFFREY TAN J
[CIVIL APPEAL NO: 12-18-1999]
30 JUNE 2000

TORT: *Negligence - Road accident - Principle in determining liability - Facts and circumstances to be considered - Whether vehicle on correct side of road - Highway Code, r. 18 - Road Traffic Rules 1959, r. 3* *c*

TORT: *Damages - Negligence - Medical expenses awarded - Whether correct to calculate medical expenses based on treatment in private hospital*

On 9 February 1999, the Sessions Court held the appellants to be 100% liable for the collision between the motorcycle ridden by the plaintiff ('respondent') and the bus driven by the first appellant (the second appellant was the owner of the bus) and awarded RM201,217 towards special damages and RM150,000 towards general damages to the respondent. This is the appellants' appeal against the finding of liability and the award of RM43,510 towards medical expenses. *d* *e*

Counsel for the appellants, relying on r. 18 of the Highway Code, argued that although the first appellant was on the wrong side of the road, given the fact that the respondent was emerging from a minor road, the respondent therefore should have given priority to the user of the major road. *f*

Held:

[1] Besides r. 18 of the Highway Code, r. 13 and also r. 3 of the Road Traffic Rules 1959 ('RTR') state that vehicles should at all times be driven on the left-hand side of the road. Rule 5 of the RTR states that a vehicle is only driven on the right-hand side of the road when it is overtaking another vehicle proceeding in the same direction. *g*

[1a] The first appellant should have foreseen that the bus, whilst overtaking at the road junction, would collide into any vehicle emerging from the junction. Indeed, all drivers know that it is perilous to overtake another vehicle at a road junction. That the first appellant was extremely reckless was more than established. *h*

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[1c] When the respondent was turning left he could not have reasonably foreseen that a vehicle would be around the corner heading directly towards him, in the wrong lane and against the flow of traffic. The respondent therefore could not be said to be liable at all.

[2] Section 63(3) of the Road Traffic Act 1987 states that failure on the part of anyone to observe any of the provisions of the Code may be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

[2a] Arising from the said collision, the first appellant was convicted for an offence under s. 43 of the Road Traffic Act 1987, for driving without due care and attention or without reasonable consideration for other road users. The case against the first appellant therefore was watertight.

[3] A victim of a road accident has to seek treatment at the general hospital, unless he is able to establish that the treatment at the government hospital was inadequate as compared to the private hospital.

[3a] On the facts, the respondent had sought treatment from a private hospital at the cost of RM38,343. Since there was no evidence that the medical treatment at the private hospital was not available at the government hospital, the award for medical expenses is reduced to RM14,503.33.

[Appeal against liability dismissed; award for medical expenses reduced.]

Case(s) referred to:

Chong Chee Khong & Anor v. Ng Yeow Hin [1997] 4 CLJ Supp 18 ***(refd)***
Chong Kam Siong v. Herman Baharuddin (Mallal's Digest [1992] 908) ***(not foll)***
Govinda Raju & Anor v. Laws [1966] 1 MLJ 188 ***(foll)***
Harcharan Singh Singh Saudagar Singh v. Hassan Ariffin [1990] 2 CLJ 393 ***(refd)***
Mooi Kim Ming & Anor v. Tang Sia Bak [1988] 2 CLJ 797 ***(foll)***
Ng Aik Kian v. Sia Loh Sia [1997] 2 CLJ Supp 218 ***(foll)***
Tajuddin Sheik Daud v. Wong Kim Yin [1989] 2 CLJ 237 ***(foll)***
Tan Sia Bak v. Mooi Kim Ming & Anor (Mallal's Digest (Jan 1989)) ***(foll)***

Legislation referred to:

Highway Code, rr. 13, 18
Road Traffic Rules 1959, rr. 3, 5, 13
Road Transport Act 1987, ss. 43(l), 68(3)

For the appellant - Lai Kuan Jean (En Shafiq); M/s Taye & Co
For the respondent - AC Vohrah; M/s Vohrah & Tan Chee Lan

Reported by Mariette Peters-Goh

JUDGMENT

Jeffrey Tan J:

On 9 February 1999, after full trial of the above running down action, the Batu Pahat Sessions Court held the appellants 100% liable for the collision between the motorcycle ridden by the plaintiff and the motor-bus (bus) driven by the lst appellant (the 2nd appellant was the owner of the bus), and awarded RM201,217 towards special damages, and RM150,000 towards general damages, to the respondent. This is the appellants/defendants' appeal against that finding on liability and the award of RM43,510 towards medical expenses.

Both parties agree, that the said collision occurred at about the junction of Jalan Bunga Raya/Jalan Yong Peng. Indeed, Mr Shafiq for the appellants said it is not in dispute, that the bus was travelling along Jalan Yong Peng, towards Labis, whilst the motorcycle was coming out from Jalan Bunga Mas unto Jalan Yong Peng towards Yong Peng, that the bus was overtaking a motor-car in front, and that the collision occurred, as one faces Yong Peng, on the left half of Jalan Yong Peng. This means, surely, that is also not in dispute that the bus was travelling, at the time of the collision, on the wrong half of the road, whereas the motorcycle was travelling on its own half of the road. Given that the bus was on the wrong half of the road, could there be any argument as to who was responsible for the collision?

But Mr Shafiq submitted, "*keutamaan semestinya diberikan kepada kenderaan yang berada di Jalan Utama*", that traffic from a minor road (meaning the motorcycle from Jalan Bunga Raya) must give way to traffic on the major road (meaning the bus on Jalan Yong Peng). "There was more liability on the plaintiff for emerging from a minor road", he added. But given that the motorcycle was on the correct half of the road, whereas the bus was overtaking a car at the road junction, and was on the wrong half of the road, that submission, to say the least, was rather strange. Unfortunately, Miss Lai Kuan Jean, lead counsel for the appellants, chose just to rehash, with respect, the same weird submission. Pointing to r. 18 of the Highway Code, she said "drivers must give way to through traffic ... a motorist from a minor road, coming out from a junction, still has to give priority to a user on the major road". She further submitted that the

respondent was negligent "to have come out from the side road", "that the respondent contributed to his own injury", and "that the plaintiff was 25% to 50% liable".

Rule 18 of the Highway Code L.N. 165/1959 & L.N. 232/1959, so much touted and so much relied on by Miss Lai, reads as follows:

> When turning left or right drivers must give way to through traffic, including pedestrians.

But there is more to r. 18 than just those words. For in r. 18 is also a drawing, and that drawing sets out pictorially the traffic scenario where a vehicle turning left or right must give way to through traffic. Together, the words and drawing say, that a car turning right must give way to through traffic from the opposite direction before turning across the path of such traffic, and that a car turning left must give way to pedestrians crossing the road (see *Govinda Raju & Anor v. Laws* [1966] 1 MLJ 188, where oncoming traffic was held as through traffic). Rule 18 does not say, not at all, that a vehicle turning left and keeping to the correct lane must give way to traffic traveling against the flow of traffic.

As a rule, "vehicles should at all times be driven on the lefthand side of the road" (see r. 13; see also r. 3 of the Road Traffic Rules 1959). A vehicle is only driven on the righthand side of the road when it is overtaking another vehicle proceeding in the same direction (see r. 5 of the Road Traffic Rules 1959). And of course, when it is safe to do so. But in the instant case, it was not safe to do so. Up ahead of the bus was a road junction, whence vehicles as yet unseen could emerge, all of a sudden, from Jalan Bunga Raya and enter Jalan Yong Peng. Indeed, at road junctions, where roads and traffic converge, vehicles emerge from one road and enter another. The lst appellant should have been foreseen, that the bus whilst overtaking at the road junction would collide, smack on, into any vehicle emerging from Jalan Bunga Raya or putting just a short nose out of Jalan Bunga Raya. Indeed, generally, all drivers know, or should know, that it is perilous, extremely perilous to overtake another vehicle at a road junction. A road junction is not, definitely not, the place to overtake a vehicle. Yet, throwing caution to the wind, the lst appellant proceeded, at or about the road junction, to overtake the vehicle in front, an act that could only be looked upon as criminal folly. And then came about what should have been reasonably foreseen - a motorcycle emerged from Jalan Bunga Raya and entered Jalan Yong Peng, towards the bus, and the hefty bus then overtaking the vehicle in front and so was obstructing the path

of the motorcycle, crushed head on into the puny motorcycle. That the lst appellant was extremely reckless, really foolhardy to the core, was more than established.

Section 68(3) of the Road Transport Act 1987 reads:

> Failure on the part of anyone to observe any of the provisions of the Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

And arising from the said collision, the lst appellant was convicted (the lst appellant pleaded guilty) of an offence under s. 43(l) of the Road Transport Act 1987, for driving without due care and attention or without reasonable consideration for other road users. Surely then, the case against the lst appellant was watertight.

Mounting what would only have been a rearguard submission, Miss Lai contended that the respondent, at the very least, was 25% to 50% liable for the collision. That the motorcycle "must give way to through traffic" but "had come out from a side road", was the gravamen of Miss Lai's contention. With respect, the motorcycle was turning left. The motorcycle was not turning across the path of through traffic. The motorcycle would only have been turning across the path of through traffic (the bus), if the bus was travelling towards Yong Peng. But the bus was travelling in the opposite direction, towards Labis, and so should not have been on the lefthand side of the road towards Yong Peng. In the wrong lane, the bus was not through traffic. The bus was reckless traffic. The bus, as well, was unforeseen traffic. The respondent, when he was turning left, could not have reasonably foreseen, that a vehicle would be around the corner heading directly towards him, in the wrong lane and against the flow of traffic. To fault the respondents, with respect, is as ludicrous as it is to fault a victim for being in the way of a gunman's bullet. The lst appellant overtook a vehicle in circumstances dangerous to other road users. So why should the respondent reap the whirlwind?

On the remaining issue of the medical expenses (it was agreed before the trial court that it amounted to RM43,510, but subject to reasonableness), Miss Lai contended that there was no evidence that the respondent must be admitted, because of any necessity, to a private hospital.

The authorities say quite definitely, that it is unreasonable to seek treatment at private hospitals when similar treatment is also available at government hospitals.

In *Tan Sia Bak v. Mooi Kim Ming & Anor* (*Mallal's Digest* (Jan 1989)); for the decision of the High Court, see *Mooi Kim Ming & Anor v. Tang Sia Bak* [1988] 2 CLJ 797), the then Supreme Court held, according to the Editor's Note, that it was unreasonable on the part of the 2nd respondent to discharge himself from the general hospital where he was first admitted to seek similar treatment at a private hospital. The Supreme Court reduced the High Court award of RM5,576.30 (the medical expenses incurred at the private hospital) to RM1,500.

In *Harcharan Singh Singh a/l Saudagar Singh v. Hassan b. Ariffin* [1990] 2 CLJ 393, the High Court held that "the plaintiff had transferred himself from the General Hospital to a private hospital", and reduced the award, in following *Tan Sia Bak v. Mooi Kim Ming & Anor*, to one third of the amount claimed.

And in *Ng Aik Kian v. Sia Loh Sia* [1997] 2 CLJ Supp 218, the High Court held that the plaintiff was only entitled, in the absence of evidence to show that the treatment at the government hospital was inadequate as compared to the private hospital, to one third of the sum incurred by him at the private hospital.

But full medical expenses at a private hospital were allowed in *Tajuddin bin Sheik Daud v. Wong Kim Yin* [1989] 2 CLJ 237, as the plaintiff was receiving "grossly inadequate attention and more probably than not, inadequate treatment" at the government hospital. *Chong Kam Siong v. Herman bin Baharuddin (Mallal's Digest* [1992] 908), it would appear, is the odd case where according to the Editor's Note it was held, against the predominant view, "that a victim in a road accident has the right to choose to seek medical treatment either in a government or in a private hospital".

Clearly, on the issue of medical expenses, the court considers the medical treatment and not the plusher accommodation provided at private hospitals (see *Chong Chee Khong & Anor v. Ng Yeow Hin* [1997] 4 CLJ Supp 18 at p. 26) that will hike up the medical expenses.

Mr. A.C. Vohrah for the respondent contended, that there was no evidence that the respondent was admitted to a private hospital. But that was not so. The respondent pleaded in the statement of claim (see p. 9 of the Appeal Record) that he paid RM38,343 to the Johore Specialist Hospital, towards his medical expenses, and produced the bills and receipts (all as

agreed documents) from the Johore Specialist Hospital and Annamalai Specialist Orthopaedic Surgery, in the bundle of documents (see pp. 121-129 of the Appeal record). The father (SP3) of the respondent testified (see p. 22 of the Appeal Record) that he admitted the respondent to the "Hospital Pakar di Johore Baru?" Undeniably, there was ample evidence that the respondent was admitted to a private hospital. Rather only, that there was no evidence that the medical treatment at the private hospital was not available at the government hospital. The medical expenses should not have been awarded in full. There should have been a suitable deduction.

So for the reasons herein, the appeal against liability is dismissed with costs, and the award for medical expenses is reduced to RM14,503.33. Since the appellants are not totally unsuccessful in this appeal, the costs of this appeal is apportioned, 80% to the respondent, and 20% to the appellants.